IN THE SUPREME COURT

Appeal from the Michigan Court of Appeals
(Before Hood, P.J., Holbrook Jr., J.J., and Owens, J.J.)

TAXPAYERS OF MICHIGAN AGAINST CASINOS, and LAURA BAIRD,

Plaintiff-Appellants,

v.

the STATE OF MICHIGAN,

Defendant-Appellee,

and

NORTH AMERICAN SPORTS MANAGEMENT COMPANY, INC., IV, and GAMING ENTERTAINMENT, LLC,

Intervening Defendants-Appellees.
_____/

Supreme Court No. 122830

Court of Appeals No. 225017

Ingham County Cir. Ct. No. 99-90195-CZ

BRIEF ON APPEAL - APPELLANT

THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

Taxpayers of Michigan Against Casinos and Laura Baird (collectively, "TOMAC") appeal under Michigan Court Rule 7.301(A)(2) the decision and order of the Court of Appeals dated November 12, 2002, Ct of Appeals Op (App at 122a), reversing the decision of the Ingham County Circuit Court dated January 18, 2000, Cir County Ct Op (App at 106a).

TOMAC asks this Court to reverse the decision of the Court of Appeals and reinstate the judgment of the Circuit Court holding that the Michigan legislature violated Article IV, Section 22, of the Michigan constitution by legislating through concurrent resolution rather than by bill, and violated Article III, Section 2, of the Michigan constitution by abdicating to the Governor unrestricted authority to amend the terms of the legislative act without legislative approval. TOMAC further asks this Court to reverse the decision of the Court of Appeals and hold that the Michigan legislature violated the "Local Acts" provision of the Michigan constitution, Article IV, Section 29, by "approving" legislation limited to certain counties within the State without following the constitutionally prescribed procedures for local acts.

QUESTIONS PRESENTED FOR REVIEW

1. Are the Michigan legislature's policy determinations in deciding whether and how to allow Indian tribes to operate casinos in Michigan legislative in nature, subject to the enactment and presentment requirements of the Michigan constitution?

The Court of Appeals answered: No

The trial court answered: Yes

TOMAC answers: Yes

State and Interveners answer: No

2. Has Congress, by enacting the Indian Gaming Regulatory Act ("IGRA"), preempted the State of Michigan's right to make policy decisions affecting gambling on Indian lands through compacts and the State of Michigan's constitutional requirements for enactment of legislation?

The Court of Appeals answered: Yes

The trial court answered: No

TOMAC answers: No

State and Interveners answer: Yes

3. Is it a violation of the Michigan constitution's separation of powers for the legislature to abdicate to the Governor the power to make new policy decisions in the compacts with Indian Tribes?

The Court of Appeals answered: This issue is not ripe for appellate review

The trial court answered: Yes

TOMAC answers: Yes

State and Interveners answer: No

Amici Curiae answer: Yes

4. Must a legislative act of local application that purports to limit casino gambling to four particular Michigan communities comply with Article 4, Section 29, of Michigan's constitution, which specifies the procedure for passing "local acts"?

The Court of Appeals answered: No

The trial court answered: No

TOMAC answers: Yes

State and Interveners answer: No

INTRODUCTION

Before December 11, 1998, a Michigan resident who tried to play slot machines on Indian lands in Calhoun county would have been committing a crime. On December 10 and 11, 1998, the Michigan legislature legalized such activity by "approving" a set of compacts with four Indian tribes. This change in the legal status of gambling was not the result of legislation passed by a majority of the elected and serving legislators, but rather the result of a concurrent resolution "approved" by *less* than a majority of all representatives.

Michigan's constitution requires that all legislation be by bill passed by a majority of members elected and serving in each house. This Court, in *Blank* v *Department of Corrections*, 462 Mich 103; 611 NW2d 530 (2000), articulated the test for determining whether action taken by the State is "legislative" in nature and thus subject to the constitutional requirements of formal enactment. Under this test, an activity is "legislative" if it (1) has the power to alter the rights, duties, and relations of parties outside the legislative branch, (2) involves policy determinations, and (3) supplants other legislative methods for reaching the same result. *Id.* at 114-115. Under this test, the compacts' "approval" is legislative action that must be effected by bill, not resolution.

The compacts at issue legalized casino-style gambling for four different Indian tribes. The compacts reflect multiple public policy decisions, such as the minimum age of those allowed to gamble and work at the casinos, the conditions under which the State and local governments can receive revenues from the casinos, the number of casinos permitted to operate in the State, and the jurisdiction given and denied the State over gambling activities. These choices impact not only the legislature, but also the tribes that are subject to the compacts, the State as a whole and how it deals with the Indian tribes, the Michigan residents who may gamble

or work at the casinos, and the local communities in which the casinos will operate. Because a majority of the house of representatives could not agree that the compacts struck the proper balance on these important policy issues, the proponents of the compacts made an end run around the required legislative process, "approving" the compacts with less than a majority of the elected and serving representatives.

The compacts also impermissibly allow the Governor of Michigan to amend the compacts without additional legislative approval of any kind. Governor Granholm recently exercised this power by amending the compact with the Odawa Indians to grant the tribe an additional casino in exchange for additional revenue payments to the State. This is a policy decision that the legislature must make. The legislature may not abdicate its responsibility to the Governor, and the Governor may not arrogate the power to herself. Because the compacts give the Governor unrestricted power to change State policy, the compacts violate the separation of powers clause of the constitution.

Finally, the compacts also violate the local acts provision of the Michigan constitution. The compacts restrict casino operations to four distinct communities in the State and ensure that a casino will never operate anywhere near the City of Detroit. As such, the compacts are local acts that must comply with the local act requirements set forth in the constitution. These requirements include passage by two-thirds of the legislature and approval by the voters in the affected communities. Neither of these requirements have been met.

This Court must instruct the legislature that the constitutional requirements for legislation apply to compacts. Indian gambling is already big business in this State, and Indian tribes in Michigan continue to press the legislature and the Governor for compacts or compact amendments that will allow even more casinos in Michigan. Voting margins in the legislature

are thin and local support for casinos is limited. Accordingly, casino proponents will continue their efforts to skirt the constitutional requirements for legislative enactments. This Court attempted to settle the important question of what constitutes "legislation" just three years ago in *Blank*, but the Court of Appeals has now unsettled it—without even mentioning this Court's decision in *Blank*. As it did in *Blank*, this Court must articulate and enforce the constitutional requirements that the legislature make public policy in this State by bill, and in accordance with all the constitutional requirements for legislation. Accordingly, TOMAC respectfully asks this Court to hold House Concurrent Resolution 115 unconstitutional, and direct that any gambling compacts be approved, if at all, by legislative enactment, and not by resolution.

STATEMENT OF FACTS

I. The legislature "approved" four gambling compacts by mere resolution after failing to marshal the support necessary for legislative enactment.

In January 1997, Michigan's Governor negotiated and signed four compacts with four Indian Tribes: the Little Traverse Bay Band of Odawa Indians, the Pokagon Band of Potawatomi Indians, the Little River Band of Ottawa Indians, and the Huron Potawatomi. The purpose of these compacts was to authorize four new Indian casinos in the State of Michigan. These four compacts are the predecessors to the compacts now at issue. By their terms, in order to become effective, the 1997 compacts required "[e]ndorsement by the Governor of the State and concurrence in that endorsement by resolution of the Michigan Legislature." These compacts failed to garner legislative approval in any form.

Prompted by the Governor's negotiation of the four compacts, State Senator John D. Cherry, Jr. and State Representative Kirk A. Profit requested the formal opinion of the Michigan Attorney General on two issues:

1) is legislative approval necessary for the State to bind itself to the four compacts, and

2) does such approval require a statutory enactment by the Michigan legislature?

The Attorney General unequivocally answered "yes" to both questions. OAG, 1997, No 6,960 (October 21, 1997) (App at 43a-45a). After observing that Article 4, § 1, of the Michigan constitution vested the legislative power in the State Senate and House, the Attorney General recognized that:

> In order to protect the integrity of the legislative process, the People have, through the Constitution, imposed specific requirements upon the exercise of this power. Const 1963, art 4, § 22, requires that "all legislation shall be by bill and may originate in either house." Const 1963, art 4, § 26, requires that no bill shall become law without concurrence of a majority of the members of each house.

Id. at *5 (App at 44a). Finding that the compacts were "clearly legislative in character," the State's own legal counsel concluded that legislative approval *by bill* was necessary. *Id.* at *7-*8 (App at 45a).

Despite the Attorney General's opinion, when the Governor and the four Tribes modified and re-executed the compacts in December of 1998, the compacts again required approval only "by resolution of the Michigan Legislature." Compacts at § 11(B) (App at 62a). The compacts were nevertheless enrolled as House Bill 5872 (1998) in an apparent attempt to have them approved by legislative act. *See Baird* v *Babbitt*, No 5:99-CV-14, slip op at 2 (WD Mich, 1999) (App at 79a). But legislative approval for this bill never materialized either. *Id.*

So, the legislature proceeded to consider the compacts by resolution. *See* HCR 115 (1998) (App at 46a). Unlike a bill, which must be passed by a majority of *elected and serving members*, a resolution may be passed by a majority vote of legislators *present at the*

time.[1] *See* Const 1963, art 4, § 26; Senate Rule 3.107. Casino supporters in the legislature were forced to proceed in this fashion because the compacts lacked the support necessary to gain approval by a majority of elected and serving legislators.

Indeed, when HCR 115 was first considered during the 1998 "lame duck" session of Michigan's House of Representatives, it was soundly defeated by a vote of 52 to 39. Over the next three days, the resolution was defeated twice more before finally being approved by a vote of 48 to 47. *See* 37 Gongwer News Service, Michigan Report No 237 (December 10, 1998) (App at 71a-74a), 1998 Journal of the House 2671-2673 (No. 83, December 10, 1998) (App at 75a-77a). The Senate eventually approved HCR 115 by a vote of 21 to 17 at 1:42 a.m. on December 11, 1998, the last day of the 89th Legislature. HCR 115 (App at 46a). Because the House had 108 elected and serving members at the time HCR 115 was considered, 55 votes were required to pass legislation. *See* 1998 Journal of the House (listing 108 members) (App at 75a); *see also Baird,* No 5:99-cv-14, slip op at 5 (noting that the House usually has 110 members, thereby normally requiring 56 votes) (App at 82a).

II. The Compacts' terms reflect policy judgments.

The four compacts in this case purport to clear the way for casino-style gambling in four communities in Michigan. Since the relevant terms of the compacts are identical, a single compact is reproduced in the Appendix at 47a-70a. The compacts were ostensibly prepared under the federal Indian Gaming Regulatory Act, 18 USC 1166-1168, 25 USC 2701-2721 ("IGRA"). Under IGRA, Indian tribes can operate gambling casinos only if they do so in

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[1] Under the Michigan constitution, a house of the legislature may conduct business if there is a quorum present. Const 1963, art 4, § 14. Thus, once a quorum is present, a majority of that quorum can pass a concurrent resolution. In real numbers, this means that a concurrent resolution can be passed with just twenty-eight House members and eleven Senators voting in favor, essentially half that required to pass a bill.

conformance with a valid "Tribal-State compact" entered into with the "State" that is "in effect." 25 USC 2710(d)(1)(C). The compacts authorized "Class III gaming" under IGRA, which includes craps, roulette, keno, slot machines, and other casino-style games. 25 USC § 2703(8); Compacts at § 3 (App at 52a-53a).

As described more fully in the Argument below, the compacts prohibit the application of State gambling laws to the four Indian casinos, *see* Compacts at § 3(A) (App at 52a-53a), and instead establish a new regulatory scheme that governs gambling activities. For instance, the compacts prohibit gambling by any "person" under the age of 18. *See id.* at § 4(I) (App at 56a.) They also govern employee licensing, record keeping and accounting practices, the posting of certain information, and a multitude of other matters. *Id.* at §§ 4(D), 4(H), 4(K) (App at 54a-56a). The compacts decide how much money the tribes will pay to the State (8% of net win from electronic games of chance) and where that money will go (the Michigan Strategic Fund). *Id.* at § 17 (App at 17a-18a). Although the local governments affected are not parties or privy to the compacts, the compacts require them to create new "Local Revenue Sharing Boards" to manage tribal payments earmarked for local expenditures. *Id.* at § 18 (App at 18a-20a).

The compacts also allow the Governor to amend their terms without additional legislative approval of any kind. Any amendment is to be initiated and negotiated by the Indian tribe and the Governor, "who shall act for the State." Compacts at §§ 16(A)-(C) (App at 16a-17a). Exercising her apparent rights under the compacts, Governor Granholm amended one of the compacts on July 22, 2003, granting the Little Traverse Bay Bands of Odawa Indians an additional casino in exchange for additional payments to be made "to the State, as directed by the Governor or designee." Amended Compact at § 17(C) (App at 138a).

III. Procedural History.

In the Ingham County Circuit Court, TOMAC sought a declaratory ruling that the compacts violated Michigan's constitution because (1) the compacts were legislation, (2) the State failed to consider and approve the compacts in accordance with the constitutional requirements for legislation, (3) the State failed to approve the compacts in accordance with the constitutional requirements for local acts, and (4) the compacts' terms transgressed the separation of powers between the executive and legislative branches.[2]

In its Opinion dated January 18, 2000, the Ingham County Circuit Court declared that HCR 115 was indeed legislation enacted through unconstitutional means, and that the compacts violated the separation of powers by giving the Governor unrestricted authority to amend their terms. Cir County Ct Op (App at 106a-121a). The court agreed with TOMAC on all counts except one: namely, TOMAC's claim that the compacts were improperly enacted "local acts" under Michigan's constitution. On November 12, 2002, the Michigan Court of Appeals reversed the Circuit Court's ruling that the compacts were unconstitutionally enacted. Ct of Appeals Op at 12-14 (App at 133a-135a). The court also determined that the separation of powers issue was not ripe for review and that the compacts were not local acts. *Id.* at 14 (App at 135a). TOMAC now asks this Court to declare that the "passage" of HCR 115 was unconstitutional, and direct that any gambling compacts be approved, if at all, by legislative enactment, and not by resolution.

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[2] Prior to the action in the Ingham County Court, Representative Laura Baird, together with State Senator Gary Peters and Jackson County Treasurer Janet Rochefort, filed suit in federal district court over the approval of the compacts by the United States Secretary of the Interior. The court declined to reach the merits of the case, finding that the plaintiffs lacked standing, a remedy under federal law, or both. But the federal court noted that the plaintiffs could seek redress in the state courts for any violations of state law. *Baird*, No 5:99-cv-14 (App at 78a-105a).

STANDARD OF REVIEW

The underlying Circuit Court Opinion and Order resolved cross motions for summary disposition under Michigan Court Rules 2.116(C)(8) and 2.116(C)(10). This Court reviews opinions and orders deciding motions for summary disposition *de novo*. *See Spiek* v *Michigan Dep't of Transportation,* 456 Mich 331, 337; 572 NW2d 201 (1998). Although duly enacted legislation is entitled to a presumption of constitutionality, *see Young* v *Ann Arbor*, 267 Mich 241, 243; 255 NW 579 (1934), the State and the Interveners cannot benefit from the presumption here because they assert that HCR 115 is not and need not be legislation. TOMAC has found no case affording any presumption in favor of concurrent resolutions, and submits to this Court that none should be applied.

ARGUMENT

I. IGRA expressly gives States a vehicle to apply judgments regarding public policy to Indian gambling.

In *California* v *Cabazon Band of Mission Indians*, 480 US 202; 107 S Ct 1083; 94 L Ed 2d 244 (1987), the United States Supreme Court determined that in the absence of an express federal law allowing state regulation of gambling in Indian country, the State of California could not regulate such gambling. In reaching this conclusion, the Court stated that "it is clear . . . that state laws may be applied to tribal Indians on their reservations if Congress has expressly so provided," but ruled that Congress had not yet acted to make state laws applicable to tribal gambling operations. *Id.* at 207. In response, Congress enacted IGRA to give the states a role in regulating Indian gambling. *See Keweenaw Bay Indian Community* v *United States* 136 F3d 469, 472 (CA 6, 1998) ("Congress enacted the IGRA in 1988 and thereby created a framework for the regulation and management of gambling on Indian land . . . which included a role for the states in the regulation of Indian gaming . . . .").

When Congress enacted IGRA, it recognized the preeminent regulatory and policy-making role of states: "'there is no adequate Federal regulatory system in place for Class III [casino-style] gaming, nor do tribes have such systems for the regulation of Class III gaming currently in place' and thus 'a logical choice is to make use of the existing State regulatory systems.'" *Pueblo of Santa Ana* v *Kelly*, 104 F3d 1546, 1549 (CA 10, 1997) (quoting S Rep No 100-446, at 13-14), *cert den* 522 US 807; *see also* 25 USC 2701(3) ("[E]xisting Federal law does not provide clear standards or regulations for the conduct of gaming on Indian lands."). Congress further recognized that a state has significant governmental interests in tribal gambling within its borders:

> As the legislative history of IGRA makes clear, '[a] State's governmental interests with respect to class III gaming on Indian lands include the interplay of such gaming with the State's public policy, safety, law and other interests, as well as impacts on the State's regulatory system, including its economic interest in raising revenue for its citizens.

Saratoga County Chamber of Commerce Inc v *Pataki*, 740 NYS2d 733, 737; 293 AD2d 20 (NY App Div, 2002) (quoting S Rep No 100-446, at 13), *aff'd as modified* 2003 NY Lexis 1470; ___ NE2d ___ (NY, 2003); *accord Pueblo of Santa Ana*, 104 F3d at 1554 (quoting S Rep No 100-446, at 13).

Congress ensured state regulatory and policy-making involvement under IGRA in at least two ways. First, in the absence of a duly enacted compact, Congress expressly made state gambling laws applicable in Indian country: "(a) Subject to subsection (c) [providing for compacts] for purposes of Federal law, *all State laws* pertaining to the licensing, regulation, or prohibition of gambling . . . *shall apply* in Indian country . . . ." 18 USC 1166 (emphasis added). This express determination by Congress reversed the impact of *Cabazon* and ensured a meaningful role for state policy in regulating Indian gaming.

Second, Congress provided the compacting process as an additional means of applying state policy. Under IGRA, Indian casino gambling is allowed *only* if conducted in conformance with a tribal-state compact. *See* 25 USC 2710(d)(1), *Pueblo of Santa Ana*, 104 F3d at 1553; *see also United States* v *Santee Sioux Tribe of Nebraska,* 135 F3d 558 (8 CA, 1998) (ordering closure of Indian casino operating without compact in violation of Nebraska laws). As explained in the legislative history:

> It is also true that S. 555 [IGRA] does not contemplate and does not provide for the conduct of class III gaming activities on Indian lands in the absence of a tribal-state compact. In adopting this position, the Committee has carefully considered the law enforcement concerns of tribal and State governments, as well as those of the Federal Government, and *the need to fashion a means by which differing public policies of these respective governmental entities can be accommodated and reconciled.*

Select Committee on Indian Affairs Report, S Rep No 100-446, at 1-6 (emphasis added); *accord Kansas* v *Finney,* 251 Kan 559, 561-562; 836 P2d 1169 (1992) (quoting same). Moreover, IGRA expressly recognizes that an appropriate compact may apply state law to Indian gambling:

> (3)(C) Any Tribal-State compact . . . may include provisions relating to-
>
> > (i) *the application* of the criminal and civil *laws and regulations* of the Indian tribe *or the State* that are directly related to, and necessary for, the licensing and regulation of such activity;

25 USC 2710(d) (emphasis added). Under the IGRA framework, the tribal-state compact is a tool that enables a state to apply its policy decisions to Indian gambling conducted within the state's borders.

II. Compacts are both legislative and contractual in nature, and must be authorized by legislative enactment.

Compacts are a unique form of legislative action that "are both statutory and contractual at the same time." *State* v *Svenson,* 104 Wash 2d 533, 538; 707 P2d 120 (1985). S*ee also Aveline* v *Pennsylvania Board of Probation and Parole,* 729 A2d 1254, 1257 (Pa, 1999)

(explaining that compacts function simultaneously as contracts and statutes); Hasday, *Interstate Compacts in a Democratic Society: the Problem of Permanency,* 49 Fla L Rev 1, 3 (Jan, 1997). The dual nature of compacts is described in the Council of State Government's manual on compacts. Zimmerman & Wendell, *The Law and Use of Interstate Compacts* (Council of State Governments, 1976), pp 1-3, 8, 34-35 (hereinafter "Zimmerman & Wendell") (App at 141a-142a, 145a, 158a.) Like any other statute, a compact supercedes prior law. Zimmerman & Wendell, p 27 (App at 154a). Moreover, because a compact is also a contract that cannot be impaired by the State, it takes precedence over subsequent statutes as well. *Id.*; *Aveline*, 729 A2d at 1257 n 10. A State may not unilaterally nullify, revoke or amend a compact unless the compact so provides. *Aveline,* 729 A2d at 1257 n 10, Hasday, 49 Fla L Rev at 3.

States may enter into compacts in one of two ways. First, a state may enact the compact's terms by statute. *See Sullivan* v *Pennsylvania,* 550 Pa 639, 648 n 7; 708 A2d 481 (1998). Second, a state may pass a law authorizing a state agency or committee to enter into a compact, *see e.g., National Transportation, Inc* v *Howlett,* 37 Ill App 3d 249, 252; 345 NE2d 767 (1976), although in such a case the authorizing legislation must contain appropriate standards and substantive provisions to support the delegation of legislative power. S*ee Sullivan,* 550 Pa at 647-648. In any event, as a general matter, whenever a state enters into a compact, it does so by bill. Zimmerman & Wendell, pp 12-13, 19-20, 34-36 (App at 147a, 150a-151a, 158a-159a).

The Michigan legislature's own research division, the Legislative Service Bureau, confirms that compacts "are usually set forth in state statutes" but that compacts may also be "created by the use of enabling legislation." Michigan Legislative Service Bureau, *Interstate Compacts*, pp 5-6 (App at 5a-6a). In noting the dual nature of compacts, the Bureau remarked:

"Not only *is a compact a statute*, but it also has the binding legal features of a contract." *Id.* at 3 (emphasis added) (App at 3a). Aside from the State's gambling compacts under IGRA, neither TOMAC nor the Michigan Legislative Service Bureau has been able to find any other instances in which the State has entered into a "compact" that was not either authorized by statute before or approved by statute after negotiation.[3]

In the instant case, however, the legislature departed from this long-established State and national precedent to "approve" the compacts by mere resolution.

III. House Concurrent Resolution 115 is unconstitutional because approving the compacts is a legislative act requiring action by bill.

A. Michigan law prohibits the use of a concurrent resolution to sidestep the legislative process.

Article IV, Section 22, of Michigan's constitution provides that "all legislation shall be by bill and may originate in either house." This language has been a part of Michigan's constitution since 1908, when it was added to curb inappropriate legislative practices: "prior to

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[3] The following is a list of Michigan's compacts (as codified) and statutes authorizing compacts: Compact concerning boundaries between Minnesota, Wisconsin and Michigan, MCL 2.201; Midwest Interstate Low-level Radioactive Waste Compact, MCL 3.751; Interstate Agreement on Qualification of Educational Personnel, MCL 388.1371; Pest Control Compact, MCL 286.501; Great Lakes Basin Compact, MCL 324.32201; Interstate Agreement on High Speed Intercity Rail Passenger Network, MCL 462.71; Interstate Insurance Receivership Compact, MCL 550.11; Interstate Compact on Mental Health, MCL 330.1920; Midwestern Higher Education Compact, MCL 390.1531; Multistate Tax Compact, MCL 205.581; Interstate Compact on Juveniles, MCL 3.701; Interstate Compact on the Placement of Children, MCL 3.711; Interstate Agreement on Detainers, MCL 780.601; Tri-State High Speed Rail Line Compact, MCL 462.81; Compact For Education, MCL 388.1301; Interstate Disaster Compact, MCL 30.261; Authorization to enter interstate agreement for employment of state military forces in other states, MCL 32.559; Authorization to enter interstate corrections compact, MCL 3.981; Authorization to enter reciprocal aid agreement with other states, MCL 30.404; Authorization to enter interstate compact to conserve oil and gas, MCL 324.62101; Authorization to enter interstate compact concerning regulation of vehicles on public highways, MCL 3.163; Authorization to enter interstate compact for crime prevention, MCL 798.103; Authorization to enter interstate compact concerning probation and parole, MCL 798.101; Authorization to negotiate compact relating to weather modification, MCL 295.107.

[1908] the Legislature used concurrent and joint resolutions in the lawmaking process to such an extent that it was deemed to have been abusive." State of Michigan Constitutional Convention of 1961, Official Record 766 (Austin C. Knapp ed.). In this case, legislators "passed" a law by concurrent resolution in an attempt to circumvent these constitutional requirements and safeguards. But, as Justice Thomas Cooley wrote:

> nothing becomes law simply and solely because men who possess the legislative power will that it shall be, unless they express their determination to that effect, in the mode pointed out by the instrument which invests them with the power, and under the forms which that instrument has rendered essential.

1 Cooley, Constitutional Limitations (8th ed), p 266; s*ee also Becker* v *Detroit Savings Bank,* 269 Mich 432, 435; 257 NW 853 (1934) (quoting Cooley).

The proper modes of action for passing legislation are set forth in Michigan's constitution, and they are unambiguous in scope and content:

Article IV, Section 22:

> *All legislation shall be by bill* and may originate in either house.

Article IV, Section 23:

> The style of the laws shall be: The People of the State of Michigan enact.

Article IV, Section 26:

> No bill shall be passed or become law at any regular session of the legislature until it has been printed or reproduced and in the possession of each house for at least five days. Every bill shall be read three times in each house before the final passage thereof. *No bill shall become a law without the concurrence of a majority of the members elected to and serving in each house* . . . .

Article IV, Section 33:

> Every bill passed by the legislature shall be presented to the governor before it becomes law, and the governor shall have 14 days measured in hours and minutes from the time of presentation in which to consider it . . . .

Const 1963 (emphasis added).

These procedures are intended to engender responsible legislation worthy of the public trust. *See Alaska* v *ALIVE Voluntary,* 606 P2d 769, 772 (Alas, 1980). For instance, requiring a specific form of enactment (i.e., "The People of the State of Michigan enact") is to "avoid confusion as to when the legislature is speaking with the force and effect of law, as distinguished from the mere expression of its views and desires." *Id.* The five-day waiting period allows citizens to learn of proposed legislation before it is passed and prevents hasty and careless acts. State of Michigan Constitutional Convention of 1961, Official Record 2334-2335 (Austin C. Knapp ed.). As one constitutional delegate succinctly put it: "Action taken in haste is likely to prove itself not in the best interest of the people." *Id.* The requirement that no law be passed without the concurrence of a *majority* of the elected members goes to the very heart of our representative system of government. Consequently, TOMAC is especially troubled that only 48 votes were cast in favor of the compacts in the house of representatives, well short of the 55-vote majority constitutionally required to pass legislation.

Courts, including this Court, have enforced these constitutional requirements by invalidating resolutions that skirt legislative procedures. In the seminal case *Immigration and Naturalization Service* v *Chadha*, 462 US 919; 103 S Ct 2764; 77 L Ed 2d 317 (1982), the United States Supreme Court considered the constitutionality of a resolution passed by the United States House of Representatives that would have resulted in the deportation of immigrant Jagdish Rai Chadha and five others. The Court found that the resolution in *Chadha* "had the purpose and effect of altering the legal rights, duties, and relations of persons, including the Attorney General, Executive Branch officials, and Chadha, all outside the Legislative Branch" and therefore was de facto legislation that failed to follow constitutional procedures. *Id.* at 952.

Thus, the Court struck down the House's resolution, aptly noting that the legislative process is intended to be a step-by-step, deliberate and deliberative process: "With all the obvious flaws of delay, untidiness, and potential for abuse, we have not yet found a better way to preserve freedom than by making the exercise of power subject to the carefully crafted restraints spelled out in the Constitution." *Id.* at 959.

Simply put, the legislature may not do indirectly what it cannot do directly. This was the conclusion of the Michigan Court of Appeals in *Blank* v *Department of Corrections*, 222 Mich App 385; 564 NW2d 130 (1997), *aff'd in part* 462 Mich 103 (2000). There, the court considered the constitutionality of a statutory provision that allowed a joint committee of the legislature ("JCAR") to veto administrative rules, with the qualification that such a veto could be superseded by a concurrent resolution of the legislature. In its analysis, the court underscored the procedural requirements found in Article 4 of Michigan's constitution, including the requirement that all legislation be "by bill" and that all bills be passed by a majority of the members serving in each house. The court determined that the JCAR was an impermissible "smaller legislative body" unconstitutionally "legislating" outside the confines of Article 4. *Id.* at 397.

The *Blank* court also condemned the use of concurrent resolutions, reasoning that resolutions are not "bills" and therefore are not an effective mode of legislative action. Thus, "when the Legislature acts by concurrent resolution, it is not making 'law.'" *Id*; *accord, Becker,* 269 Mich at 434-435 (noting that a mere resolution "is not a competent method of expressing the legislative will, where that expression is to have the force of law, and bind others than the members of the house or houses adopting it.") (quoting *Mullan* v *California*, 114 Cal 578; 46 P 670 (1896)).

This Court affirmed the *Blank* decision and expressly adopted the United States Supreme Court's reasoning in *Chadha*. *See Blank* v *Department of Corrections,* 462 Mich 103, 114; 611 NW2d 530 (2000). In so doing, this Court emphasized that "[w]hen the Legislature engages in 'legislative action' it must do so by enacting legislation," not by concurrent resolution. *Id.* at 119. Although there was no single majority opinion in *Blank*, a majority of four justices adopted the *Chadha* analysis. *See Blank*, 462 Mich at 114-122 (Opinion of Justice Kelly, joined by Justices Corrigan and Young), 129-30 (Opinion of Justice Weaver, concurring).[4]

Moreover, even the two Justices who did not adopt the *Chadha* analysis[5] recognized the need for some proper legislative enactment to stand behind the action of the legislature. Justice Markman concurred in the judgment of the Court striking down the JCAR resolution process on the particular facts of the case using a rationale that would not permit the legislature to use a resolution in the absence of *some prior statutory enactment* that properly authorizes its use. Even Justice Cavanagh, in dissent, agreed that a prior statutory enactment was necessary to authorize the resolution process. *Blank,* 462 Mich at 153-178. As he emphasized in his dissent:

> [the Michigan Administrative Procedures Act] became law *as a product of the normal legislative process: enactment by introduction and passage of a bill* that was eventually presented to and signed by the Governor . . . The enabling statute that conferred rulemaking power upon the DOC in the first place *was also enacted pursuant to constitutional procedures.*

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[4] Binding precedent is created in a plurality decision if a majority of Michigan Supreme Court justices agree on a grounds for decision. *See People* v *Stevens,* 461 Mich 655, 663 n 7; 610 NW2d 881 (2000), *cert den* 531 US 902. The only decisions that are not binding under the doctrine of *stare decisis* are those in which no majority of justices agree. *See People* v *Gahan,* 456 Mich 264, 274; 571 NW2d 503 (1997).

[5] Justice Taylor did not participate in the *Blank* case.

Blank, 462 Mich at 155 (emphasis added).[6] Thus, all justices in *Blank* recognized the constitutional need for some statutory enactment, an element entirely lacking in the legislative process leading up to the "approval" of the compacts by resolution here.

This makes the present case even more compelling than *Blank.* Unlike *Blank,* which dealt with the use of committee vetoes and concurrent resolutions *authorized by Michigan statute*, this case involves no legislative enabling act at all. Rather, by resolution of less than a majority of elected and serving members of the house, HCR 115 authorizes four new casinos that would otherwise be illegal. There was *no* normal legislative process and *no* bill enacted using constitutionally mandated procedures. To the contrary, the legislative attempt to approve the compacts by bill failed.

B. "Legislation" is any rule that is binding on those outside the legislature, implements public policy, and supplants other forms of legislative action.

In *Blank,* this Court defined "legislation" as any action that (1) "has the power to alter the rights, duties, and relations of parties outside the legislative branch," (2) "involves policy determinations,"[7] and (3) "supplants other legislative methods for reaching the same result." *Blank,* 462 Mich at 112-120.[8] Whether an act is legislation depends not on its form, but

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[6] The resolution at issue in *Chadha,* too, was authorized by Congressional Act, specifically the Immigration and Nationality Act, 8 USC 1254. *Chadha,* 462 US at 923.

[7] The legislature is, after all, the final arbiter of the State's public policy. *Michigan Gaming Inst, Inc* v *State Bd of Educ,* 451 Mich 899; 547 NW2d 882 (1996) (adopting dissenting opinion of *Michigan Gaming Inst, Inc* v *State Bd of Educ*, 211 Mich App 514, 522; 536 NW2d 289 (1995)). *See also American States Ins Co* v *Detroit Auto Inter-Ins Exch,* 117 Mich App 361, 367; 323 NW2d 705 (1982) ("Policy making is fundamentally a legislative prerogative"). The United States Supreme Court has reasoned: "The essentials of the legislative function are the determination of the legislative policy and its formulation and promulgation as a defined and binding rule of conduct . . . ." *Yakus* v *United States,* 321 US 414, 424; 64 S Ct 660; 88 L Ed 834 (1944).

[8] *See also In re Manufacturer's Freight Forwarding Co,* 294 Mich 57, 63; 292 NW 678 (1940) ("[L]egislation . . .looks to the future and changes existing conditions by making a new

upon whether it contains "matter which is properly to be regarded as legislative in its character and effect." *Chadha*, 462 US at 952.

Applying this standard, the *Blank* Court found that the concurrent resolution power (together with the committee veto power at issue) amounted to "legislation" because such resolutions: (1) affected the duties of individuals outside the legislative branch (specifically, the Director of the Department of Corrections, who had promulgated the new administrative rules involved), (2) involved policy decisions (i.e., whether or not to sanction the "inevitable policy issues" enveloping the proposed rules), and (3) supplanted other legislative modes of action (i.e., accepting or amending the rules by bill). *Blank*, 462 Mich at 114-117.

C. The compacts are "legislation."

Even more so than the concurrent resolutions in *Blank*, HCR 115 amounts to legislation. As contemplated by IGRA, the compacts adopted and "enacted" by HCR 115 impact State public policy, create new rules and obligations binding on those outside the legislature, and supplant the constitutionally required mode of approval by bill. Among other things, HCR 115:

- *creates an entire regulatory scheme for Indian gaming* in Michigan substantially different than the regulatory scheme defined by Michigan law and made applicable to the tribes by federal law;
- *determines the jurisdictional balance* between the State of Michigan and the tribes;
- *determines how many casinos each tribe will be allowed to have in Michigan*;
- *sets the minimum age for casino gambling at eighteen* – a significant change from Michigan's current policy, which prohibits casino gambling by anyone younger than twenty-one;

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rule, to be applied thereafter to all or some part of those subject to its power.") (quoting *Prentis* v *Atlantic Coast Line Co,* 211 US 210; 29 S Ct 67; 53 L Ed 150 (1908) (Holmes, J)).

- *decides how much revenue to raise for the State and where that revenue will go*;

- *bars casinos within 150 miles of Detroit* to protect the Detroit casinos from competition, but does not protect other entertainment or business venues from competition; and

- *creates new local units of government*, known as "Local Revenue Sharing Boards," to receive and distribute what amounts to a local tax on the tribes.

Indeed, in the absence of the compacts, the gambling allowed by compact would be a crime. *See* 18 USC 1166; *see also United States* v *Cook*, 922 F2d 1026, 1034 (CA 2, 1991) (affirming conviction for operation of slot machines on Indian lands in violation of New York law). It is no wonder the Attorney General of Michigan, in response to a question from the legislature, declared that the compacts are "clearly legislative in character" requiring enactment by bill. OAG, 1997, No 6,960, p *5 (October 21, 1997) (App at 44a).

1. The compacts make policy decisions.

> Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice . . . .
>
> *Rodriguez* v *United States*, 480 US 522, 526; 107 S Ct 1391; 94 L Ed 2d 533 (1987).

a. Gambling involves important decisions of public policy.

Decisions regarding gambling are public policy decisions. This truth rings clear in Justice (then Judge) Corrigan's dissenting opinion in *Michigan Gaming Inst, Inc* v *State Bd of Education*, later adopted by this Court, in which Justice Corrigan emphasized the connection between gambling, public policy, and the legislature's enactments:

> The legislature is the final arbiter of this state's public policy. The quintessential political judgment whether to alter the quality of our collective life in Michigan in legalizing casino gambling should occur in the political branch. Unless and until the people's elected representatives cast their votes to change our state's longstanding policy against casino gambling, petitioners application is premature.

Michigan Gaming Institute, 211 Mich App 514, 522; 536 NW2d 289 (1995) (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996); *see also United States* v *Washington*, 879 F2d 1400, 1401 (CA 6, 1989) ("It was rational for the Michigan legislature to choose to attack only the dangers presented by private lotteries (such as cheating, fraud, and particularly the involvement of organized crime).").

It is not just the decision *whether* to permit gambling that involves State policy, but also *how* gambling will be conducted, if permitted. Thus, when the legislature has carved out exceptions to its general prohibition against gambling,[9] it has either strictly limited or "highly regulated" the excepted activities, making policy choices regarding who, when, and where such gaming will be allowed. *See Michigan Gaming Institute*, 211 Mich App at 522 (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996); s*ee, e.g.,* MCL 432.201 *et seq.* (regulating the Detroit casinos), MCL 432.101 *et seq.* (regulating charitable gambling).

For instance, setting the minimum age for gambling is a matter of public policy. Policy considerations might include the impact on schools and truancy, the fact that alcohol is served in casinos, and the susceptibility of minors to gambling problems and addiction. The compacts, without legislative enactment, set the age for tribal gambling in Michigan at eighteen. *See* Compacts at § 4(I) (App at 56a). The trial court properly identified this decision as a matter of State policy:

> There are several aspects of the compacts that have the hallmarks of legislation. Perhaps the most remarkable provision the State has approved, via the compacts, is that a person of the age of 18 may lawfully engage in casino style-gambling, an

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[9] The general rule in Michigan is that gambling is illegal. For example, under the Michigan Penal Code, individuals can be fined or jailed for taking bets, maintaining a residence for gambling, or running a gambling room. *See* MCL 750.301 - 750.303. Frequenting a gambling site is a misdemeanor. *See* MCL 750.309. The Michigan legislature has also deemed any place used for "lewdness, assignation of prostitution or gambling" a public nuisance. MCL 600.3801.

> act generally prohibited by Michigan law. Section 18 of the Michigan Gaming Control and Revenue Act, being MCL 432.201 *et seq*; MSA ____, makes it a misdemeanor for a person under the age of 21 to engage in casino-style gambling. This act excludes from its application gambling on Indian territory. Section 3(2)(d). However, the Court finds instructive that the Legislature has previously made similar policy decisions, e.g. age of person who may lawfully engage in casino gambling, through Legislation.

Cir County Ct Op at 9-10 (App at 114a-115a). In the end, the State could have pursued an age limit of twenty-one, sixteen, twelve, or no age limit at all, depending on its policy goals. This important matter warrants full participation of the legislature, full accountability, and enactment by bill.

b. The compacts create an extensive regulatory scheme.

As with other exceptions to Michigan's general prohibition against gambling, the compacts set forth an extensive regulatory framework governing tribal gaming activities. Compacts at §§ 3-10 (App at 52a-61a). The compacts specify who may be hired, the types of games that may be played, and who may wager at such games. *Id.* at §§ 3 (D), 4(I) (App at 52a-56a). The compacts also set forth accounting and record keeping requirements, requirements for posting information in casinos, and standards for gambling supplies and equipment purchased by the tribes. *Id.* at §§ 4(H), 4(K), 6 (App at 55a-59a). Even the Court of Appeals in this case acknowledged that "[t]he terms of the compact contained various regulatory provisions." Ct of Appeals Op at 2 (App at 123a).

Comparing provisions in the compacts with statutory provisions regulating the three non-Indian casinos permitted in Detroit underscores this point. The compacts cover the same regulatory ground and, in some instances, make policy choices that differ from the choices applicable to the three Detroit casinos:

Compacts	Michigan Gaming Control & Revenue Act
No person *under the age of 18* may participate in any Class III game. Compacts at § 4(I) (App at 56a).	A person *under age 21* shall not be permitted to make a wager under this Act. MCL 432.209(9).
The Tribe may not license, hire, or employ as a key employee or primary management official . . . in connection with Class III gaming, any person who: . . . (3) Has been convicted of or entered a plea of guilty or no contest to any offense not specified in subparagraph (2) [*gambling related offense, fraud or misrepresentation*] within the immediately preceding five years. Compacts at § 4(D) (App at 54a).	A casino licensee shall not employ an individual as a managerial employee who has been convicted *of a felony* in the previous 5 years . . . . MCL 432.209(14).
The Tribe may not license, hire, or employ as a key employee or primary management official . . . in connection with Class III gaming, any person who: (1) Is *under the age of 18* . . . . Compacts at § 4(D) (App at 54a).	To be eligible for an occupation license, an applicant shall: (a) Be *at least 21 years of age* if the applicant will perform any function involved in gaming by patrons. MCL 432.208(3).

Such regulatory provisions are hallmarks of legislation. To emphasize this point, TOMAC notes that when Michigan law changed to allow casino gambling to take place, it was by a vote of the citizens of the State, it was specifically tailored to allow gambling to take place only in Detroit, and it was followed by implementing legislation that set up a State regulatory scheme. It was not done by concurrent resolution.

c. The compacts determine the number of casinos.

Another policy decision in the compacts is the number of casinos that will be authorized: i.e., how much should the State encourage or discourage the proliferation of gambling? In making such a policy decision, legislators might consider the impact of casinos on gambling addiction, crime, tourism and competing businesses like entertainment venues and restaurants, weighed against the State's need to raise revenue. Although a majority of elected

representatives have never determined that the compacts strike the proper balance on this issue, the compacts as originally "approved" limit each tribe to one casino. Compacts at § 2(B) (App at 51a-52a).

The number of permitted casinos, however, is subject to change without legislative approval. Governor Granholm recently amended the Odawa Indian compact to give the Odawa an additional casino in exchange for additional payments to the State. (Amended Compact, App at 136a-139a.) Thus, it appears that at least the Granholm Administration has made the policy decision to favor additional casinos to raise State revenue. Whether a majority of legislators agree with this policy decision is unknown and, according to the terms of the compacts, irrelevant because the Governor has the putative power to make this key policy choice entirely on her own, thus bypassing the normal legislative process.

d. The compacts set State policy governing the balance of legal jurisdiction between the State and tribes.

Nor was the normal legislative process used to strike the important balance between State and tribal jurisdiction in the compacts. As a general rule, jurisdictional issues are addressed through law. *See Straus* v *Barbee,* 262 Mich 113, 114; 247 NW 125 (1933) (ruling that "[j]urisdiction arises from law, and not from consent"), *Goldberg* v *Trustee of Elmwood Cemetery,* 281 Mich 647, 649; 275 NW 663 (1937) (declaring that parties cannot by consent deprive the court of jurisdiction conferred by statute). As mentioned above, IGRA applies State gambling law to Indian lands in the absence of a compact, *see* 18 USC 1166, and expressly authorizes the incorporation of State civil or criminal laws in compacts, s*ee* 25 USC 2710(d)(3)(C). IGRA further provides that compacts may contain provisions relating to "the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations." 25 USC 2710(d)(3)(C). Thus, as a matter of

public policy and legislative prerogative, a State must decide what jurisdictional balance it will agree to in the compact and negotiate a compact that best reflects that policy. Policy considerations might include the State's interest in protecting its citizens by retaining control over enforcement, the availability of State resources to take on additional criminal or civil jurisdiction, and issues of sovereignty.

The Brief filed by Amicus Curiae Senate Majority Leader Ken Sikkema and Appropriations Chair Shirley Johnson acknowledges that the compacts strike a jurisdictional balance between the State and the Tribes:

> [T]he original Compact adopted by the Michigan Legislature reflected a specific balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of its operators, the regulation of alcoholic beverages, imposition of age requirements for participation in gaming activities, revenue payments, and the respective civil and criminal jurisdictions for the State and the Tribe necessary for the enforcement of state or tribal laws or regulations.

(Amicus Curiae Brief at 18-19.) These "policy determinations," (*id.* at 19), effectively determine the applicability and reach of Michigan's laws and jurisdiction. This is a balance that must be struck by legislative enactment with a majority of elected and serving legislators, not through approval by resolution of less than a majority of legislators.

In *New Mexico* v *Johnson*, 120 NM 562; 904 P2d 11 (1995), the New Mexico Supreme Court invalidated IGRA compacts "approved" without an act of the legislature as an unconstitutional "attempt to create new law" because, among other things, the compacts struck a "balance between the respective roles of the State and the Tribe in such important matters as the regulation of Class III gaming activities, the licensing of operators, and respective civil and criminal jurisdictions . . . ." *Id.* at 573-574. According to the Court, "the actual balance that is

struck represents a legislative function." *Id.* at 574. New Mexico has since enacted a statute setting forth the specific terms of the IGRA compacts. *See* NM Stat Ann 11-13-1.

In this case, the compacts strike the balance in favor of unfettered gambling by the tribes: "Any state law restrictions, limitations or regulation of such gaming shall not apply to Class III games conducted by the Tribe pursuant to this Compact." Compacts at § 3(A) (App at 52a-53a). IGRA itself makes State gambling laws applicable in Indian country in the absence of a compact. *See* 18 USC 1166. A minority of legislators has effectively repealed the application of these laws to Indian lands and left the State without jurisdiction over the tribal gambling operations. This kind of policy decision requires a legislative enactment passed by a majority of elected and serving legislators.

e. The compacts make policy decisions by raising and spending State revenue.

As this Court has previously noted, "[T]he control of the purse strings of government is a legislative function. Indeed, it is the supreme legislative prerogative, indispensable to the independence and integrity of the Legislature, and *not to be surrendered or abridged*, save by the Constitution itself." *Civil Service Comm'n of Michigan* v *Auditor General,* 302 Mich 673, 682; 5 NW2d 536 (1942) (emphasis added). Here, the gambling compacts, passed by mere resolution, require the tribes to pay 8% of net wins from electronic games of chance into the Michigan Strategic Fund ("MSF"). Compacts at § 17 (App at 65a-66a).[10] This 8% payment likely represents hundreds of millions of dollars over just the twenty

[10] The Court of Appeals has held that the MSF is a quasi public corporation apparently not subject to the constitutional rules regarding legislative appropriations. *Tiger Stadium Fan Club* v *Governor,* 217 Mich App 439, 452; 553 NW2d 7 (1996). *Tiger Stadium* held that the Appropriations Clause of the Michigan constitution did not require that a bill be passed in order to send Indian gambling payments to the MSF. However, *Tiger Stadium* did not consider the issue here: namely, whether the compacts themselves amount to legislation given the reasoning

year period that the compacts are initially effective.[11] How to raise and spend millions of dollars is part of the legislature's right and responsibility to "determine the sources from which public revenues shall be derived and the objects upon which they shall be expended" as provided by law. *Civil Service Comm'n of Michigan,* 302 Mich at 682. This legislative determination requires a legislative enactment.

f. Conclusion: the policy decisions in the compacts are legislative in nature.

In sum, Congress granted an important policy-making role to States for addressing the many societal issues raised by tribal gambling. The legislature, as the "final arbiter of this state's public policy,"[12] has a responsibility to follow the legislative process in evaluating the policy choices made in the compacts. As recognized by the trial court below, the legislature abdicated its duty to legislate:

> While it is not this Court's place to pass judgment on this public policy; this case involves just that – an issue of public policy. As such, it is for the people of the State, via their representatives in the Michigan Legislature, to determine the State's policy regarding gambling. Therefore, when the Legislature changes its longstanding policy regarding casino-style gambling, it must do so through enactment of legislation and all the procedures pertaining thereto.

Cir County Ct Op at 2 (App at 107a).

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of *Blank* (which was decided after *Tiger Stadium*). In any event, Governor Granholm's amendment to the Odawa's Compact makes this case factually distinguishable from *Tiger Stadium*, as the funds are no longer directed to the MSF. *See* Amended Compact (App at 136a-139a).

[11] Just two casinos operating from 1999 to 2003 contributed over $34 million to the MSF. *See* http://www.michigan.gov/documents/8_percent_Payments_76616_7.pdf.

[12] *Michigan Gaming Institute*, 211 Mich App at 522 (Corrigan, J, dissenting), *dissenting opinion adopted by* 451 Mich 899 (1996).

2. The compacts create new rules and impose additional duties on those outside the legislature.

The compacts also meet the definition of "legislation" set forth in *Blank* because they alter the rights, duties and relations of parties outside the legislative branch. The compacts set forth a variety of requirements applicable to "persons"[13] outside the legislature. For example, as noted above, the compacts make casino gambling and employment legal for an entire class of citizens—those who are aged 18, 19 and 20—for whom casino gambling and employment is ordinarily prohibited under Michigan's regulatory scheme. *Compare* Compacts at §§ 4(D), 4(I) (App at 6a-8a) *with* MCL 432.209(9). The compacts also establish background requirements applicable to any person seeking employment at the casino. Compacts at § 4(D) (App at 6a-7a). All of these regulatory provisions create new rules of conduct applicable outside the legislature.[14]

The compacts also create additional State rights that did not exist before. For instance, according to the compacts, the State now has the right to inspect tribal facilities and records. Presumably, a State employee outside the legislature would carry out such activities. The compacts reimburse the State for these activities up to $50,000 a year. *Id.* at § 4(M)(5) (App at 58a). The compacts also require the tribes to make "semi-annual payments to the State." *Id.* at § 17(C) (App at 65a-66a).

Moreover, many of the compacts' requirements involve State or local government activity occurring off-reservation. For example, the compacts are binding on "the State" as a

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[13] The term "person" is defined broadly to mean: "a business, individual, proprietorship, firm, partnership, joint venture, syndicate, trust, labor organization, company, corporation, association, committee, state, local government, government instrumentality or entity, or any other organization or group of persons acting jointly." Compacts at § 2(D) (App at 52a).

[14] Note that the State's policy choices affect not only non-Indian citizens of Michigan, but also members of the tribes themselves, who are also citizens of the State. *See Iowa Mutual Ins Co* v *LaPlante,* 480 US 9; 107 S Ct 971; 94 L Ed 2d 10 (1987).

whole. *Id.* at § 12(A) (App at 62a). Among other things, the compacts bind "the State" to secrecy regarding certain types of financial and proprietary information concerning Indian tribes and their members. *Id.* at § 4(M)(3) (App at 57a-58a). This requirement undoubtedly applies to all branches and agencies of the State, not just the legislature. The compacts also protect the Detroit casinos from competition. They restrict the tribal casinos to an area 150 miles (90 miles for the Calhoun County casino) outside of Detroit. *Id.* at § 16(A)(iii) (App at 64a). And they restrict the Tribes from having any Indian lands taken into trust in the restricted area. *Id.* at § 16(A)(iii) (App at 64a).

Perhaps most remarkably, the compacts also subject local units of government to a new set of requirements and procedures. Specifically, the compacts obligate the four host communities to establish "Local Revenue Sharing Boards" to receive and disburse what amounts to a 2% tax assessed on the Indian tribe's operations and impose additional duties on County Treasurers:

> **SECTION 18. Tribal Payments to Local Governments**
>
> (A) From and after the effective date of this Compact . . . the Tribe will make semi-annual payments to the treasurer for the county described in paragraph (ii)(l) of this subsection 18(A) to be held by said treasurer for and on behalf of the Local Revenue Sharing Board described below, as follows:
>
> (i) Payment in the aggregate amount equal to two percent (2%) of the net win at each casino derived from all Class III electronic games of chance, as those games are defined in this Compact. The county treasurer shall disburse the payments received as specified by lawful vote of the Local Revenue Sharing Board.
>
> (ii) It is the State's intent, in this and its other Compacts with federally recognized tribes, that the payments to local governments provided for in this section provide financial resources to those political subdivisions of

> the State which actually experience increased operating costs associated with the operation of the Class III gaming facility. *To this end, a Local Revenue Sharing Board shall be created by those local governments in the vicinity of the Class III gaming facility to receive and disburse the semi-annual payments from the Tribe as described below. Representatives of local governments in the vicinity of the Class III gaming facility shall be appointed by their respective elected body and shall serve at the pleasure of such elected body.*

Id. at § 18 (emphasis added) (App at 66a-67a). The compacts dictate the creation of a Board, the makeup of the Board and how the Board will spend the new local revenue. *Id.* at § 18 (App at 66a-68a).

The creation of Local Revenue Sharing Boards is a prime example of the compacts' legislative "character and effect." TOMAC is unaware of any other instance in which the State has created a new unit of local government by a contract approved by mere resolution. Indeed, the very suggestion seems absurd. Michigan's constitution is replete with instances authorizing the creation of local units of government by bill. *See e.g.*, Const 1963, art 7, §§ 2, 7, 14. There is no provision permitting creation of a local unit of government by contract.

HCR 115 and the compacts it purports to approve meet this Court's definition of legislation, set forth in *Blank*, necessitating action by bill. Michigan's Attorney General concisely summed up this inquiry and conclusion:

> A major purpose of the proposed compacts is to authorize the Indian tribes to conduct specific casino gaming activities that would, absent the compacts, be in clear violation of several Michigan statutes. The proposed compacts further establish numerous requirements to be met in the management and operation of Indian gaming facilities, regulate the types and sources of gaming equipment that may be used, provide for arbitration of disputes that may arise under the compacts, subject the gaming operations to state liquor licensing and control laws, and commit the tribes to make semi-annual payments to the state and to local units of government. These provisions, purporting to be binding upon the state, are clearly legislative in character.

OAG, 1997, No 6,960, pp *4-*5 (October 21, 1997) (App at 44a). Because the compacts are legislation, the legislature's "approval" of the compacts by HCR 115 was unconstitutional.

3. HCR 115 supplants other appropriate modes of legislative action.

House Concurrent Resolution 115 also violates the final test in *Blank*, because it supplants the appropriate and constitutionally mandated modes of legislative action. *Blank*, 462 Mich at 117. As noted in more detail above, the compacts change legislatively enacted laws that otherwise prohibit casino gambling at the locations approved in the compacts. Given the policy decisions made in the compacts and the impact they have on the State and its residents, the tribes, and the local communities in which the casinos will operate, these compacts are legislative in nature and require approval by bill. Moreover, passage by bill has been established by law, treatise, and historical practice as the appropriate means to approve compacts. *See* Argument Section II, *supra* at 10-12. As it has done in the past with compacts, the legislature should have approved these compacts by bill, or the legislature should have enacted enabling legislation authorizing the State to enter into compacts.

Indeed, the Michigan legislature considered and rejected an enabling act in 1988 that would have created a "tribal-state commission" to negotiate and enter into IGRA compacts, such as the compacts at issue. SB 1061 (1988) (App at 39a-42a). And, after Michigan's Attorney General ruled that the compacts were "legislative," the legislature also considered but failed to approve the compacts by bill. *See Baird*, No 5:99-cv-14 (App at 78a-105a). Only after proponents tried and failed to enact the compacts through the appropriate mode did they resort to a resolution. This is the same impermissible use of concurrent resolution that was struck down in *Chadha* and the same circumvention of the legislative process that was invalid in *Blank*.

As mandated by *Blank*, the legislative mode of action was clearly the appropriate mode for approving the compacts. This required a bill, styled to say "The People of the State of Michigan enact," printed and reproduced and in possession of each house for at least five days, read three times, approved by a majority of the members elected to and serving in each house, and then presented to the governor. Const 1963, art 4, §§ 22, 23, 26, 33. Instead of following the constitutionally required method designed to ensure responsible legislation, the proponents of HCR 115 circumvented the constitutional protections and "approved" the compacts with a minority of elected and serving representatives. The constitution requires a more responsible form of legislative decision-making. Therefore, this method of "approving" the compacts must be ruled unconstitutional.

IV. Other State Supreme Courts that have examined compacts agree that compacts are legislative in nature.

Although less than half of the States have entered into gambling compacts with Indian tribes, States normally enter into such compacts pursuant to legislation, either by approving the compacts by bill or by enacting enabling legislation prescribing the process for compact negotiation.[15]

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[15] Some were enacted by legislative bill. *See e.g.* Cal Gov't Code 12012.5(a), (b) (California), NM Stat Ann 11-13-1 (New Mexico); *cf.* Ohio Rev Code Ann 107.25 (Ohio statute setting forth procedure for ratification of compacts by legislative act). Many were entered into pursuant to a specific statute delegating the authority to negotiate and execute tribal compacts to the governor or a particular commission or committee. *See* Ariz Rev Stat 5-601 (Arizona), Cal Gov't Code 12012.5(d) (California), Colo Rev Stat 12-47.2-101 and 12-47.1-301 (Colorado), Idaho Code 67-429A (Idaho), Iowa Code 10A.104(10) (Iowa), Kan Stat Ann 46-2303 (Kansas), La Rev Stat Ann 46:2303 (Louisiana), Minn Stat 3.9221 (Minnesota), Neb Rev Stat 9-1,106 (Nebraska), ND Cent Code 54-58-03 (North Dakota), Okla Stat Ann, tit 74, 1221 (Oklahoma), SD Codified Laws 1-4-25 and 42-7B-11 (South Dakota), Wash Rev Code 9.46.360 and 43.06.010 (Washington), Wis Stat 14.035 (Wisconsin). Other states have more generally, through their constitution or statute, delegated the authority to transact business or form agreements and compacts with the Indian tribes. *See Willis* v *Fordice*, 850 F Supp 523, 532-533, n 10 (SD Miss, 1994) (holding that Mississippi statute, Miss Code Ann 7-1-13, authorized the

Other State Supreme Courts that have considered this issue also agree that gambling compacts are legislative in nature, thereby necessitating formal legislative action. For example, in *Kansas* v *Finney*, 251 Kan 559, 582; 836 P2d 1169 (1992) (per curiam), the Kansas Supreme Court ruled that a compact giving the State the right to inspect tribal casinos and creating a new "State Gaming Agency" within the Kansas Lottery was legislative in nature. Similarly, in *New Mexico* v *Johnson*, 120 NM 562, 573; 904 P 2d 11 (1995), the New Mexico Supreme Court invalidated IGRA compacts entered into by the governor because the compacts changed existing public policy:

> Our legislature has, with narrow exceptions, made for-profit gambling a felony, and thereby expressed a general repugnance to this activity. Whether or not the legislature, if given an opportunity to address the issue of the various compacts, would favor a more restrictive approach consistent with its actions in the past constitutes a legislative policy decision.

Johnson, 120 NM at 574.[16] The court also looked at the State's past practices and noted that since 1923 the State had entered into twenty-two compacts with other sovereign entities, and "[i]n every case, New Mexico entered into the compact with the enactment of a statute by the legislature." *Id.* at 575. Finally, in *Saratoga County Chamber of Commerce Inc* v *Pataki,* 2003

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governor to negotiate and transact business, including compacts, with other sovereigns, such as Indian tribes), Mont Code Ann 18-11-103 and 90-1-105 (Montana).

[16] The New Mexico Supreme Court confirmed this result in *Gallegos* v *Pueblo of Tesuque*, 132 NM 207; 46 P3d 668 (2002), when it ruled that as a result of its prior decision the compacts were invalidated until enacted as legislation in 1997. According to the *Gallegos* court, the compact was "a contract between the State of New Mexico and Tesuque, codified by the Legislature," *Gallegos*, 132 NM 218, which is consistent with the general rule that compacts are both contracts and statutes. *See also* NM Stat Ann 11-13-1 (enacting IGRA compacts). Although the *Gallegos* court cites without discussion *Confederated Tribes of the Chehalis Reservation* v *Johnson,* 135 Wash 2d 734, 750; 958 P2d 260 (1998) ("compacts are agreements, not legislation"), it is apparent from a review of the *Johnson* case that the Washington court was speaking in terms of compact *interpretation*–i.e., that, for purposes of interpretation, compacts follow the rules of contract interpretation. Washington had previously enacted enabling legislation that empowered a commission to enter into compacts. *See* RCW 9.46.360(9).

NY Lexis 1470, *34; ___ NE2d ___ (NY, 2003), *cert den* 2003 US Lexis 8378; ___ US ___ (November 17, 2003) the New York Court of Appeals invalidated a 1993 compact, explaining that gaming compacts are "laden with policy choices" that epitomize legislative power.

Like the compacts in *Finney, Johnson* and *Pataki*, the compacts at issue in this case also require legislative action. The compacts "approved" by HCR 115 are laden with policy choices, as recognized by Michigan's Attorney General. OAG, 1997, No 6,960, pp *4-*5 (October 21, 1997) (App at 44a). The compacts create a new layer of government, requiring the local communities impacted by the casinos to create "Revenue Sharing Boards." Compacts at § 18 (App at 66a-68a). Approval of these compacts by concurrent resolution also departs from the established practice of entering into compacts by statute. Michigan Legislative Service Bureau, *Interstate Compacts*, pp 5-6 (App at 5a-6a). Consistent with *Blank* and the decisions of other States, the compacts at issue could not be approved by mere concurrent resolution.

V. The Court of Appeals' interpretation of IGRA is clearly erroneous and must be reversed.

The Court of Appeals erred in it's interpretation of IGRA. The Court held: (1) that IGRA preempts all State regulation of casino gambling on Indian lands, a ruling that robs the State of the authority Congress expressly granted to it under IGRA; (2) that the federal government can force compacts on States, a determination inconsistent with that of the United States Supreme Court; (3) that IGRA and the federal Compacts Clause determine the manner in which a State must approve an IGRA compact, therefore displacing State constitutional law; and (4) that the compacts are mere contracts, thus ignoring their legislative impact. None of these holdings withstand scrutiny.

A. IGRA does not preempt state law, but instead provides a mechanism for the states to regulate gambling on Indian lands.

A remarkable component of the Court of Appeals' decision is its conclusion that IGRA preempts a State's role in regulating casino gambling on Indian lands. Specifically, the court noted: "The compact agreements were not the result of a decision by the citizenry at large or a policy choice by members of the legislature, but rather, the result of congressional policy in an area where state law is preempted." Ct of Appeals Op at 11 (App at 132a). This is contrary to the plain language of IGRA. If allowed to stand, this ruling would leave the State with no voice as to the nature of Indian gambling within its borders, precisely the opposite of what Congress intended by enacting IGRA. *See* Argument Section I, *supra*, at pp 8-10.

As noted above (see pages 9-10), in the absence of a duly enacted gambling compact, Congress expressly made State gambling laws apply to Indian country. 18 USC 1166.[17] This express determination by Congress reversed the impact of *Cabazon* and ensured that state policy determinations regarding gambling would apply to Indian lands. Citing this provision, the California Supreme Court recently confirmed that federal law does not "preempt" state laws concerning gambling in Indian country, but instead applies them. *See Hotel Employees & Restaurant Employees Int'l Union* v *Davis*, 21 Cal 4th 585, 611; 981 P2d 990 (1999).[18]

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[17] Under § 1166, federal authorities enforce state gambling laws on Indian lands. Thus, courts that have looked at § 1166 have concluded that conduct violating state licensing, regulatory or prohibitory law is punishable under that section, even though the activity may not violate federal law. *See United States* v *Cook*, 922 F2d 1026, 1034 (CA 2, 1991) (affirming conviction for operation of slot machines in violation of New York law).

[18] While the Eighth Circuit, in *Gaming Corp of America* v *Dorsey & Whitney*, 88 F3d 536 (CA 8, 1996), stated that IGRA completely preempts state gambling laws on Indian lands, the *Dorsey* court was dealing with a jurisdictional removal question and thus only looked at the preemption issue in the context of federal court jurisdiction; it did not consider the impact of 18

Second, if a State enters into a compact with a tribe, IGRA's compacting provision gives a State the right to ensure that it's policies will continue to apply. 25 USC 2710(d)(3)(C). As with all compacts between sovereigns, this ability is not unilateral nor without limitation.[19] IGRA requires that states negotiate "in good faith" to enter into a compact.[20] 25 USC 2710(d)(3)(A). This obligation, however, does not strip the State of the right or the duty to make policy decisions in the course of negotiations. Thus, the IGRA compacting process gives a state a means to pursue, negotiate and apply its policy choices to tribal gaming.

The Court of Appeals was wrong not only when it declared that the State's role was preempted by IGRA, but also when it ruled that "federal law dictates that the state negotiate compacts with Indian tribes to allow casino gambling on Indian reservations." It is true that the original legislative scheme permitted a tribe to sue a state in federal court for refusing to negotiate in good faith over a compact, and permitted the federal court to order a state to conclude a compact or to submit to mediation. *See* 25 USC 2710(d)(7). The United States Supreme Court, however, has invalidated this unconstitutional imposition on state sovereign

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USC 1166. Two years later, the Eighth Circuit, under 18 USC 1166, applied state law to prohibit Indian casino gambling conducted without a compact. *See United States* v *Santee Sioux Tribe of Nebraska*, 135 F3d 558, 563-65 (CA 8, 1998). TOMAC is unaware of any case holding that state laws relating to casino gambling do not apply to Indian lands in the absence of a compact.

[19] All State legislation is, of course, subject to limitation by the U.S. Constitution, Michigan's constitution, federal laws, and the bounds of State jurisdiction.

[20] What constitutes good or bad faith has received little attention in the courts due to the decision in *Seminole Tribe of Florida* v *Florida,* 517 US 44; 116 S Ct 1114; 134 L Ed 2d 252 (1996), which held that states are immune under the Eleventh Amendment from suits that attempt to force states to negotiate IGRA compacts. However, the Eighth Circuit, pre-*Seminole,* was confronted with this issue and determined that a State could demand "in good faith" compact provisions that were consistent with state law. *Cheyenne River Sioux Tribe* v *South Dakota,* 3 F3d 273, 279 (CA 8, 1993) (ruling that State was not negotiating in bad faith by refusing to agree to set betting limits higher than State statutory $5 limit).

immunity and ruled that an Indian tribe cannot use IGRA to sue an unconsenting state in federal court. *Seminole Tribe of Florida* v *Florida*, 517 US 44, 72-73; 116 S Ct 1114; 134 L Ed 2d 252 (1996). The decision in *Seminole* preserves the power of the states to control the spread of Indian casino gambling within their borders.[21] Contrary to the Court of Appeals' decision, a state need not negotiate any compact at all.

In short, these erroneous rulings by the Court of Appeals diminish the role of the State to merely rubber-stamping an Indian tribe's gambling preferences. This is inconsistent with the plain language of IGRA and robs the State of powers that the United States Supreme Court has recognized are preserved to the State under the United States Constitution. These rulings must be reversed.

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[21] The Bureau of Indian Affairs ("BIA") responded to *Seminole* by promulgating regulations that purportedly authorize the agency to impose a compact on an unwilling state by "administrative" proceedings initiated by a tribe. *See* Bureau of Indian Affairs: Class III Gaming Procedures, 64 FR 17535 (April 12, 1999) (codified at 25 CFR 291). But these regulations are also invalid. In the first place, Congress explicitly delegated all power to enact regulations under IGRA to the newly created National Indian Gaming Commission, not BIA. *See* 25 USC 2706(b)(10), 2709. Second, no executive agency has the power to claim for itself a function–in this case, enforcement of IGRA's compacting procedures–that the statute expressly grants to the federal courts. *See Adams Fruit Co* v *Barrett*, 494 US 638, 649-50; 110 S Ct 1384; 108 L Ed 2d 585 (1990) (refusing to honor agency regulations regarding workers' compensation benefits where Congress delegated enforcement to the judiciary). Finally, any attempt by BIA to do in an administrative forum what *Seminole* said could not be done in court violates sovereign immunity to the same extent as IGRA itself did. *See South Carolina State Ports Authority* v *Federal Maritime Comm'n*, 535 US 743, 760; 122 S Ct 1864; 152 L Ed 2d 962 (2002) (striking down agency enforcement scheme on the basis of sovereign immunity: "[I]f the Framers thought it an impermissible affront to a State's dignity to be required to answer the complaints of private parties in federal courts, we cannot imagine that they would have found it acceptable to compel a state to do exactly the same thing before . . . an agency . . . ."). To TOMAC's knowledge, the BIA rules have not been used to force any state to negotiate or accept a compact against its will.

B. The Court of Appeals erred in deciding that federal law rather than state law determines the manner in which IGRA compacts are approved.

The Court of Appeals also incorrectly held that federal law determines the manner in which a state approves compacts. Specifically, the court erred in ruling that (1) IGRA expressly authorizes the State legislature to approve a compact by concurrent resolution, and (2) the federal Compact Clause authorizes approval by concurrent resolution. To the contrary, state law determines the proper process for approval of a compact and requires that the compacts be approved as legislation.

1. State constitutional law determines how states enter into compacts.

State law not only sets gambling policy, it also determines how a state can validly "enter into" and bind itself to a gambling compact under IGRA. The question of whether state or federal law determines the manner in which a compact is approved was squarely addressed in *Pueblo of Santa Ana* v *Kelly*, 104 F3d 1546, 1557-1558 (CA 10, 1997). *Pueblo of Santa Ana* involved a declaratory action brought by Indian tribes from the State of New Mexico for a determination that certain compacts approved by the Secretary of the Interior pursuant to IGRA were valid even though the governor of the State of New Mexico lacked authority to enter into the compacts. *Id.* at 1548. The Tenth Circuit determined that a compact, even if approved by the Secretary of the Interior, is invalid unless it is first properly approved by a state. *Id.* at 1555. The court then applied U.S. Supreme Court precedent to conclude that in the absence of specific guidance in IGRA, *state law* would determine the proper procedure for executing valid compacts. *Id.* at 1557-1558.

The California Supreme Court recently agreed: "[for a compact] [t]o be 'entered into' [under IGRA] by the state and the tribe means to be 'entered into' validly in accordance with state (and tribal) law." *Hotel Employees*, 21 Cal 4th at 612; *accord, Saratoga County*

Chamber of Commerce, Inc v *Pataki*, 712 NYS2d 687, 696; 275 AD2d 145 (NY App Div, 2000) (ruling that state law determines whether a state has validly bound itself to a compact); s*ee also New Mexico* v *Johnson*, 120 NM at 578 (ruling that the United States Congress cannot expand the authority of a state or its officials over and above the authority granted by a state's constitution).

2. IGRA does not determine how a compact is approved.

The Court of Appeals erroneously interpreted IGRA as expressly authorizing a state's approval of a compact by resolution. Ct of Appeals Op at 12-13 (App at 133a-134a). This is a simple misreading of the statute. *See* 25 USC 2710(d). While IGRA specifies that the *Indian tribe* may approve a compact by resolution, *see* 25 USC 2710(d)(1)(A), it is silent as to how a state must approve of the compact, *see* 25 USC 2710(d)(1)(C). Even Appellee, the State of Michigan, admits: "IGRA does not specify what is required for a state to validly bind itself to a compact. It has been held that the issue is determined by state law. *See Pueblo of Santa Ana* v *Kelly*, 104 F3d 1546, 1557 (CA 10 1997)." (State of Michigan's Brief in Opposition to Application for Leave to Appeal at 5 n 3.) *See also Saratoga County,* 2003 NY LEXIS 1470, *33 (ruling that IGRA leaves to state law who will negotiate and agree to a compact).

3. The federal Compact Clause is also inapplicable.

In ruling that concurrent resolution was an appropriate method of approving these compacts, the Court of Appeals also relied heavily upon cases interpreting the federal Compact Clause to conclude that approval by bill was unnecessary. Citing *United States Steel Corp* v *Multistate Tax Comm'n*, 434 US 452; 98 S Ct 799; 54 L Ed 2d 682 (1978), the court noted, "The approval by resolution contained in the IGRA is consistent with federal law addressing compacts. Congressional approval was generally one of historic occurrence rather than

necessity. The true test of congressional approval occurs when powers of an entity are usurped." Ct of Appeals Op at 13 (App at 134a). While the federal Compact Clause may address the question of whether and how the U.S. Congress must approve a compact, it does *not* address the way in which a *state* must *enter into* a compact.[22]

The *Multistate Tax Commission* opinion verifies that the federal Compact Clause is inapplicable here. The case involved the issue of whether a compact between states, establishing a Multistate Tax Commission, required approval by the United States Congress. *Multistate Tax Comm'n,* 434 US at 454. The Supreme Court concluded that Congressional approval was not required because the compact did not impermissibly encroach upon federal supremacy. *Id.* at 472-473. What was not in dispute, and what the Court *did not address*, was the mechanism by which the states had entered into the compact. In fact, each state that had entered into the compact, including Michigan, had done so by way of legislation. *Id.* at 454 n 1; *see also* MCL 205.581.

No other court has looked to the federal Compact Clause to determine how a state is to enter into an IGRA compact. Rather, all courts to have examined the question have concluded that *state* law governs. *See, e.g., Pueblo of Santa Ana*, 104 F3d at 1557-1558. Under Michigan law, the appropriate test for determining whether the compacts constitute legislation, requiring approval as a bill, is set forth in *Blank*. The Court of Appeals' reliance upon *Multistate Tax Commission*, instead of *Blank*, is clear error.

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[22] The federal Compact Clause provides: "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State, or with a foreign Power . . . ." US Const, art I, § 10, cl 3. A literal reading of the clause would require the states to obtain congressional approval of some form before entering into any agreement among themselves. The U.S. Supreme Court, however, has eschewed such an approach and held that congressional approval of a compact is only required for agreements that tend to encroach upon or interfere with the supremacy of the United States. *See Multistate Tax Comm'n*, 434 US at 471, *Cuyler* v *Adams*, 449 US 433, 440; 101 S Ct 703; 66 L Ed 2d 641 (1981).

C. The Court of Appeals erred in concluding that the legislature routinely approves compacts by resolution.

As its final argument for finding that the compacts could be approved by concurrent resolution, the Court of Appeals stated that "contracts executed by the State of Michigan are routinely approved by the resolution process." Ct of Appeals Op at 13 (App at 134a). This ignores the crucial distinction between a mere contract for goods or services and a compact between the State and an Indian tribe *regulating* gambling on Indian lands. As made clear by *Chadha* and *Blank*, it is the effect of the action, not its form, that is determinative. While a compact may take the form of a contract, its substantive impact is legislative. Michigan Legislative Service Bureau, *Interstate Compacts*, p 3 (App at 3a). Michigan's long-standing practice has been to approve *compacts* as legislation. *See id.* at 11-36 (App at 11a-36a); *see also* Argument Section II, *supra* at 10-12 and n 3.

In further support of its position, the Court of Appeals pointed to a set of IGRA compacts that were at issue in the cases *Tiger Stadium Fan Club, Inc* v *Governor*, 217 Mich App 439; 553 NW2d 7 (1996), *app den* 453 Mich 866, and *McCartney* v *Attorney General*, 231 Mich App 722; 587 NW2d 824 (1998), *app den* 601 Mich 101. While both *Tiger Stadium* and *McCartney* dealt with issues related to Indian gambling, neither case dealt with the determinative issue here: whether IGRA compacts require legislative enactment under the Michigan constitution.

Tiger Stadium involved a question regarding the status of funds paid by Indian tribes into the Michigan Strategic Fund under a federal court consent decree settling a compacting dispute under IGRA. *Tiger Stadium,* 217 Mich App at 441-442. The court concluded that the funds at issue were not subject to the Appropriations clause, so that the governor did not need to seek legislative action before agreeing to the payment directly to the

fund. *Id.* at 454-455. The court, however, did not decide the threshold question of whether the compacts were legislation. In fact, the court acknowledged that it was not deciding this question. *Id.* at 455-456 n 5 ("We recognize that it is a separate question whether the concurrent resolution would constitute sufficient legislative action if the revenues were determined to be subject to appropriation, one we do not address because our decision that the revenues are not subject to appropriation makes it unnecessary to do so.")

McCartney involved a suit under FOIA to obtain certain State documents related to IGRA compact negotiations. *McCartney,* 231 Mich App at 724. The court focused on the Governor's power to negotiate compacts, not on whether compacts require legislative approval by bill. *See id.* at 729. If anything, the court strongly implied that the IGRA compacts were legislation by noting, in reference to the compacts, that the Governor "is constitutionally authorized to present and recommend *legislation*" to the legislature. *McCartney*, 231 Mich App at 726 (emphasis added). Other courts, in fact, have cited *McCartney* for the proposition that IGRA compacts are legislative in nature. *See, e.g., Saratoga County*, 2003 NY Lexis 1470, at *37 (citing *McCartney*). In any case, neither *Tiger Stadium* nor *McCartney* decided whether compacts required approval by bill.

As additional support for its characterization of the compacts as mere "contracts," the Court of Appeals also noted, "irrespective of whether the terms of the compact encroach upon legislative functions, the inability to enforce those terms precludes a challenge to the constitutionality of the compact." Ct of Appeals Op at 13 (App at 134a). The court's apparent conclusion that the compacts are unenforceable is contrary to the plain language of the compacts. The compacts specifically allow the State to inspect the tribal casino operations, *see* Compacts at § 4(M)(2) (App at 57a), and include an enforcement provision in the event that the State believes

that the tribe is not administering and enforcing the regulatory requirements set forth in the compact, *id.* at §§ 4(M)(6), 7 (App at 10a, 11a-12a). IGRA specifically gives substance to these provisions as it only allows gambling to take place "in *conformance* with a Tribal-state compact." 25 USC 2710(d)(1)(C) (emphasis added). Moreover, the Court of Appeal's focus on the enforcement language as a test for whether the compacts are legislative in nature is misguided, for the choice of whether and how a compact will be enforced is itself a policy decision that is legislative in nature. The court should have applied the *Blank* analysis, and its failure to do so is clear error.

VI. The compacts violate Article III, Section 2 (separation of powers) of Michigan's constitution because they purport to empower the Governor to make policy judgments without legislative approval.

Michigan's constitution provides for a separation of powers between the branches of government:

> The powers of government are divided into three branches; legislative, executive and judicial. No person exercising powers of one branch shall exercise powers properly belonging to another branch except as expressly provided in this constitution.

Const 1963, art 3, § 2. The legislative power is clearly reserved in Michigan's constitution to the State House and Senate. Const 1963, art 4, § 1. Thus, it is neither the Governor's duty nor right to enact legislation.[23] Instead, it is the task of the executive branch to "take care that the laws be faithfully executed." Const 1963, art 5, § 8; *Sutherland* v *Governor*, 29 Mich 320, 324 (1874) (Cooley, J.); s*ee also Musselman* v *Governor*, 200 Mich App 656, 664; 505 NW2d 288 (1993) (quoting *Sutherland*), *aff'd* 448 Mich 503. Any delegation of power between the branches of

[23] The Governor may present and recommend legislation. Const 1963, art 5, § 17. But she may not bind the State to legislation without seeking the approval of the legislature by bill. *See e.g., McCartney* v *Attorney General,* 231 Mich App 722; 587 NW2d 824 (1998).

government must be "limited and specific." *Judicial Attorneys Ass'n* v *Michigan*, 459 Mich 291, 296-297; 586 NW2d 894 (1998).

The compacts unconstitutionally grant the executive branch legislative authority in violation of the Michigan constitution. They empower the Governor to amend the compacts without any legislative approval. *See* Compacts at §§ 16(A)(i)-(iii), (B), (C) (App at 64a-65a); Cir County Ct Op at 13 (App at 134a). Indeed, they require the Governor to report an amendment to the legislature only *after* the amendment has already been approved and entered into by the Governor and by the Secretary of the Interior. Compacts at §§ 16(B)-(D) (App at 65a). And the scope of the Governor's authority to enact amendments is virtually unlimited. The only restriction is on the Governor's ability to amend the definition of "eligible Indian lands" to permit gambling in counties other than those listed in the compacts. *Id.* at § 16(A)(iii) (App at 64a). Otherwise, the Governor has complete freedom to amend the compacts without legislative approval.

The Michigan Court of Appeals ruled that this issue was not yet ripe because the compacts have not yet been amended. But on July 22, 2003, Governor Granholm signed on behalf of the State of Michigan an amendment to one of the Indian compacts challenged in this case. Amended Compact (App at 136a-139a). The Amendment, which is "binding on the State" for a new term of twenty-five years, demonstrates the far-reaching policy-making power now in the hands of the Governor. Significantly, the amendment:

- *Gives the Little Traverse Bay Bands of Odawa Indians (the "Odawa") an extra casino. See* Amended Compact at § 2(B)(1) (App at 136a). The Traverse City Record Eagle reports that the Odawa are looking at a site in Mackinaw City for their second casino. Keith Matheny, *Granholm Gives OK to New Casino,* Traverse City Record Eagle, July 26, 2003. While casino advocates were unable to garner a legislative majority to support even one casino for the Odawa, now there will be two. Whether the People of the State of Michigan are in favor of yet another casino in northern

Michigan is not known because they were never informed through the legislative process.

- *Gives the Governor control over casino revenue sharing payments made to the State.* Previously, the compact required that all revenue sharing payments flow to the Michigan Strategic Fund. Now, all such payments are to go "to the State, *as directed by the Governor or designee.*" Amended Compact at § 17(C) (App at 138a). Thus, the Governor can apparently send millions of dollars to the general fund or whatever pet agency, department, or quasi-governmental unit she chooses. This is nothing more than an appropriation of State funds without a legislative enactment.

- *Changes the age of legal gambling at the new casino from 18 to 21.* Amended Compact at § 4(I) (App at 137a). The implications of this change, however salutary on policy grounds, are troublesome: the Governor alone can now set the legal gambling age at Indian casinos, or do away with the restriction altogether. This is a legitimate issue of State policy that should receive approval by legislative enactment.

- *Trades revenue sharing payments to the State for a casino monopoly in a ten county area and a moratorium on new lottery legislation.* Amended Compact at § 17 (App at 137a-139a). If a "change in State law is enacted" allowing gambling in a ten county area, "including expansion of lottery games beyond that allowable under State law on the date of execution of this document," then payments to the State cease. In effect, a government-sanctioned ten county monopoly has been created, and payments have been arranged to help protect the future of the monopoly, without any legislation whatsoever.

As the amendment illustrates, the compacts allow the governor to make policy choices that have a tremendous impact on the State of Michigan, including more casinos, more deals to raise revenue, and any number of other decisions that will be made without legislative approval. These important choices will never be approved by a majority of the Michigan legislature unless the Court of Appeals' ruling is reversed.

VII. The compacts are local acts under Article IV, Section 29 (local or special acts) of Michigan's constitution because they expressly operate with particular impact on four specifically identified communities within the State.

A. The compacts are local acts.

The compacts are not only legislation, they are "local act" legislation because they operate with particular impact on four Michigan communities rather than on the State as a whole. In general, a local act is an act "which operates over a particular locality instead of over the whole territory of the state or any properly constituted class or locality therein, or which operates on particular persons or things in a class, or which relates to the property or persons of a particular locality." OAG, 1979-1980, No 5,711, p 794 (May 22,1980) (quoting 82 CJS, Statutes, § 168, pp 283-284). The legislature cannot circumvent the constitutional prohibition against local acts by subterfuge–instead, it is the practical operation of the legislation that determines its character. *See Michigan* v *Wayne Co Clerk*, 466 Mich 640; 648 NW2d 202 (2002) (ruling that failure of statute to identify Detroit by name did not prevent it from being a local act); *City of Dearborn* v *Board of Supervisors*, 275 Mich 151, 157; 266 NW 304 (1936) (invalidating statute that could only apply to Wayne County).

In this case, the legislature did not even attempt to disguise the local nature of the act. Rather, it expressly limited the effect to four specified Michigan communities: 1) the Pokagon Band is limited to the counties of Allegan, Berrien, Van Buren, and Cass; 2) the Little Traverse Bay Bands of Odawa Indians to the counties of Emmet and Charlevoix; 3) the Little River Band of Ottawa Indians to the counties of Manistee and Mason; and 4) the Huron Potawatomi Indians must build its casino in Calhoun County. To ensure that the effects will be limited to these communities, the compacts make it practically impossible for any of the tribes to establish additional casinos outside of these areas by requiring that any such casino must share

revenues with all other recognized tribes in the State. Compacts at § 9 (App at 61a). Locality is further restricted by a complete prohibition of any casino within 150 miles of Detroit (or 90 miles in the case of the Calhoun County casino). *Id.* at § 16(A)(iii) (App at 64a).

Because the casinos are limited to four specific communities, the compacts are local acts. In *Huron-Clinton Metro Authority* v *Board of Supervisors*, 300 Mich 1; 1 NW2d 430 (1942), the Michigan Supreme Court verified that Michigan Act No. 147 of 1939, establishing the Huron-Clinton Metropolitan Authority, was a local act. Like the present case, the Act restricted the Authority's powers and duties (generally, to purchase, own and operate parks) to five named counties. Unlike the present case, however, the Act was passed according to the constitutionally prescribed procedures for local acts. *Id.* at 14.

B. The compacts do not comply with the constitutional requirements for local acts.

The Michigan constitution imposes strict limits on the ability of the legislature to use local acts:

> The Legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. *No local or special act shall take effect until approved by two-thirds of the members elected to and serving in each house and by a majority of the electors voting thereon in the district affected.*

Const 1963, art 4, § 29 (emphasis added). This Section is intended to eliminate the vast volume of local legislation that once burdened and discredited the legislature. *Common Council of the City of Detroit* v *Engel*, 202 Mich 536, 543; 168 NW 462 (1918). As such, the Section's restrictions are viewed expansively. *Id.*

The prohibition against local acts guards against unjustified favoritism, or its opposite–the saddling of certain communities with undesirable "not in my back yard" projects. Such considerations are especially appropriate in the instant case. It is easy to imagine winning

support for the compacts by pointing out that the casinos could only be built in certain communities in the State and, therefore, most legislators would be insulated from negative consequences in their districts or from their constituents. Meanwhile, the citizens in those areas are burdened with additional traffic, crime, and public services that they must provide as a consequence of the compacts.

Despite this, the Court of Appeals ruled that the compacts were not local acts, allegedly because "[t]his state has no authority to regulate conduct on Indian tribal lands." Ct of Appeals Op at 14 (App at 135a). As demonstrated above, however, the court has wrongly concluded that IGRA robs the State of authority over Indian gambling. Even more fundamentally, the geographic restriction is not about regulating conduct on Indian lands, but rather about limiting gambling to certain parts of the State.

Under IGRA, the Indian tribes are not limited to their current reservation land for casino operations. Rather, the tribes can request the federal government to take additional lands in trust as Indian lands suitable for gambling under IGRA. *See* 25 USC 465; 25 USC 2719. In many cases, particularly where the land is part of a restoration of lands (e.g., the Pokagon Band) or an initial reservation (e.g. the Huron Potawatomi), IGRA does not impose any geographic restriction as to where these additional lands may be. Thus, without the geographic restrictions found in the compacts, the tribes could potentially open a casino anywhere within the State. These geographic restrictions, therefore, operate to keep casino operations out of all but the four communities identified in the compacts. *See* Compacts at §§ 9, 16(A)(iii) (App at 61a, 64a). This is a policy decision, insulating the Detroit casinos from competition and other Michigan communities from the unwanted burdens associated with gambling operations. Because the

compacts limit the tribes to certain areas of the State when they would not otherwise be so-limited, the compacts are local acts.

The Ingham County Circuit Court also erroneously ruled that the compacts were not local acts. The court based the holding on its conclusion that TOMAC had failed to argue that a general act could have accomplished the same purpose as the local act. With all due respect to the Circuit Court, it appears to have misread the requirements of the constitution.

Constitutional provisions must be interpreted in "the sense most obvious to the common understanding . . . ." *House Speaker* v *Governor*, 443 Mich 560, 577; 506 NW2d 190 (1993). The most obvious and plain reading of Section 29 is to impose three requirements on local acts: 1) there can be no local act at all if it is possible to enact an act of general application; 2) any proper local act must be approved by a two-thirds vote of the legislators; and 3) any proper local act must be approved by a vote of the people in the affected community. Failure to comply with *any* of the above requirements is enough to invalidate a local act. Since HCR 115 was "passed" without a two-thirds vote of the legislature and without approval by vote of the people in the affected communities, it failed to comply with the local acts requirement regardless of whether an act of general application was possible.

Moreover, even if it were necessary for TOMAC to establish that a general act was possible, TOMAC can do so. A general act would have included approving the compacts minus the restriction on where the casinos could be located, leaving the "Indian lands" question up to the normal operation of IGRA. Thus, if a tribe could procure Indian trust lands in Detroit,

it could build a casino there. A general act could easily have been enacted if the political will had existed.[24]

Other States have used the general act approach. Several States have enacted general enabling acts that give the statutory authority to a person or committee to enter into compacts under IGRA without territorial restrictions. *See e.g.*, La Rev Stat Ann 46:2303, Wis Stat 14.035; Wash Rev Code 9.46.360. These are general acts that are not slanted or biased for, or against, any particular location. The Michigan legislature's failure to muster a political majority for this approach is not a constitutional justification for pawning the problem off on four communities.

The compacts are local acts, yet were not approved by a two-thirds vote of the State House and Senate and by a majority vote of the affected electorate, as required by Michigan's constitution. The compacts are also invalid because they are local acts that were "enacted" when an act of general applicability could have been enacted instead. For both of these reasons, the compacts violate Article IV, Section 29 of Michigan's constitution of 1963.

CONCLUSION

The "quintessential political judgment" on what terms, if any, to permit casino gambling within the State of Michigan requires public policy judgments. The Michigan constitution requires the legislature, not the Governor, to make these judgments, and to do so by legislative enactment. A resolution supported by neither a majority of all elected and serving legislators, nor by any of the constitutionally required formalities for legislation, is an unlawful

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[24] Indeed, the legislature originally tried a general act approach by proposing to create by an enabling act a public body that would pass on questions of proposed compacts regardless of their location. *See* SB 1061 (1988) (App at 39a-42a). The proposal failed.

end run around the constitution, as both the Circuit Court and the Michigan Attorney General recognized.

Contrary to the Court of Appeals' ruling, IGRA does not trump the State's policy-making role. Quite the opposite: IGRA actually reinforces the role of the State by expressly applying to Indian country the normal laws of the State governing casino-style gambling, unless and until the State makes different policy choices in a valid gambling compact. IGRA itself makes no policy choices for the State. IGRA does not set age limits for gambling. IGRA does not prescribe who may and may not work in a casino. IGRA does not specify the games of chance that a casino may offer. IGRA does not establish wagering limits for the allowed games. IGRA does not direct how much money, if any, the casino must pay to the host state. All of these public policy choices—and hundreds more—are left to a state's judgment in the compacting process.

When the State of Michigan makes binding choices like these for people outside the legislature, the Michigan Constitution requires it to do so by legislative enactment, as this Court held in *Blank*, a case the Court of Appeals completely ignored. Like the Court of Appeals, the legislature failed to honor *Blank* and the constitutional requirements it articulated. Instead, after failing to marshal a majority of legislators in support of a legislative enactment, a minority of legislators tried to make these public policy choices by resolution. This Court must declare the attempt invalid and direct that Indian gambling compacts be approved, if at all, by legislative enactment consistent with all applicable provision of the Michigan Constitution.

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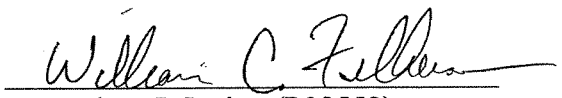
By 

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